Azmer bin Mustafa v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–328 OF 2010
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
21 MARCH 2014

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C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Offence of trafficking drugs — Accused person caught carrying bag containing drugs — Defence of accused person that he was instructed by friend to fetch someone — Non-calling of friend as witness — Whether detrimental to defence case — Whether defence fully appreciated — Whether defence probable — Whether there were gaps in handling of exhibits — Dangerous Drugs Act 1952 s 39B

D

Evidence — Witness — Failure of prosecution to call witness — Accused person caught carrying bag containing drugs — Defence of accused person that he was instructed by friend to fetch someone by car — Accused person's wife was sitting in passenger seat — Non-calling of wife to give testimony — Whether detrimental to defence case

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Acting upon information received that a certain drug trafficking activity would take place, a team of police officers proceeded to the suspected place and kept vigil. A Proton Wira driven by the appellant along with a woman passenger was seen stopping in front of a shop. The appellant alighted from the said motorcar, carrying in his right hand a plastic bag and walking towards the row of shop houses. The appellant looked as if he was waiting for someone. The police approached the appellant and introduced himself. The appellant tried to escape but was successfully caught. The appellant dropped the plastic bag which he was carrying. After being examined, the bag was found to contain compressed dried vegetable matters suspected to be cannabis, wrapped in aluminium foils and clear plastic. The woman passenger ('Yana') was said to be the appellant's wife. Before proceeding to the police station, the appellant and Yana took the police to their house where 1kg of cannabis were retrieved and three male Indonesians were also arrested. It was the appellant's defence that he was asked by a man named 'Agus' to fetch someone and the appellant had agreed. The appellant proceeded to the said place in Agus's Proton Wira accompanied by Yana. According to the appellant, he did not carry anything when he alighted from the motorcar. Suddenly, three male individuals who turned out to be policemen arrested him. The appellant argued that he did not attempt to run away when he was arrested because he had no opportunity to escape and he did not put up a struggle. After his arrest, the appellant gave a cautioned statement

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that 'Agus' stayed with him and the cannabis was found inside his car. Having found that the defence did not raise any reasonable doubt, the High Court convicted the appellant for trafficking in 2,884g of cannabis, an offence under s 39B of the Dangerous Drugs Act 1952 and sentenced him to death. Hence, the present appeal. The issues that arose for the court's determination in the appeal were the non-calling of Yana; and the gaps in the handling of the exhibits by the non-calling of the store keeper.

Held, allowing the appeal; setting aside the conviction and sentence of High Court:

(1) The High Court judge did not consider the defence raised by the appellant in his cautioned statement. His Lordship did not judicially appreciate the defence of the appellant as stated in his cautioned statement. It was the bounden duty of the trial judge to consider that defence. A weak or an unreasonable defence must be considered and appreciated judicially. It should not be brushed aside without giving it due consideration. Such failure amounted to a non-direction by His Lordship and that non-direction amounted to misdirection (see paras 27–28).

(2) Yana was certainly a key witness. She saw the whole episode while seated as a front passenger in the said motorcar. She was not called as a witness by the prosecution and her statement was not tendered and marked as an exhibit by the prosecution. The prosecution should have tendered Yana's statement to negate all the negative inferences that arose. There was no attempt to trace Yana at all. The prosecution failed to secure the attendance of Yana in court and the failure to tender Yana's statement recorded under s 112 of the Criminal Procedure Code crippled the prosecution's case. Yana was not even offered to the defence at the close of the prosecution's case. She was an indispensable prosecution witness that would tie up the loose ends and drive home the charge against the appellant beyond reasonable doubt. Without Yana, the presumption under s 114(g) of the Evidence Act 1950 must be vigorously applied against the prosecution (see paras 36, 42–43 & 48).

(3) There was no duty on the part of the appellant to call Yana as his witness. In fact, there was no duty on the appellant to call any evidence at all. The appellant was at liberty to adopt one course of action and not the other. Indeed it was the appellant's choice and whatever choice he made, no unfavorable inference should be drawn against him (see para 45).

(4) The exhibits seized from the scene of the crime were the same exhibits that were analysed and brought to the High Court and that being the case, there was no necessity to call the storekeeper. Consequently, there was no merit in the contention of the gaps in the handling of the exhibits by the non-calling of the store keeper (see para 38).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima bahawa kegiatan pengedaran dadah tertentu akan berlaku, sepasukan pegawai polis telah menuju ke tempat yang disyaki dan telah sedia berjaga. Sebuah Proton Wira yang dipandu oleh perayu bersama penumpang wanita telah dilihat berhenti di hadapan sebuah kedai. Perayu telah turun dari kereta itu, membawa beg plastik di tangan kanannya dan berjalan menuju barisan rumah kedai. Perayu kelihatan seperti menunggu seseorang. Polis telah mendekati perayu dan memperkenalkan diri. Perayu cuba melarikan diri tetapi dia telah berjaya ditangkap. Perayu telah menjatuhkan beg plastik yang dibawanya. Selepas diperiksa, beg itu didapati mengandungi bahan tumbuhan kering yang mampat disyaki kanabis, dibalut dalam kerajang aluminium dan plastik lutsinar. Penumpang wanita ('Yana') itu dikatakan isteri perayu. Sebelum pergi ke balai polis, perayu dan Yana telah membawa polis ke rumah mereka di mana kanabis seberat 1kg telah ditemui dan tiga lelaki Indonesia juga telah ditangkap. Adalah pembelaan perayu bahawa dia telah diminta oleh lelaki bernama 'Agus' untuk mengambil seseorang dan perayu telah bersetuju. Perayu telah pergi ke tempat tersebut dengan Proton Wira Agus ditemani oleh Yana. Menurut perayu, dia tidak membawa apa-apa apabila dia turun dari kereta itu. Tiba-tiba, tiga orang lelaki yang merupakan polis telah menangkapnya. Perayu berhujah bahawa dia tidak cuba melarikan diri semasa dia ditangkap kerana dia tiada peluang untuk melarikan diri dan dia tidak cuba bergelut. Selepas penangkapanya, perayu telah memberi kenyataan beramaran bahawa Agus tinggal bersamanya dan kanabis itu telah dijumpai di dalam keretanya. Setelah mendapati bahawa pembelaan tidak menimbulkan apa-apa keraguan munasabah, Mahkamah Tinggi mensabitkan perayu kerana mengedar kanabis seberat 2,884kg, satu kesalahan dibawah s 39B Akta Dadah Berbahaya 1952 dan menjatuhkan hukuman mati ke atasnya. Justeru, rayuan ini. Isu-isu yang timbul untuk ditentukan mahkamah dalam rayuan ini adalah Yana yang tidak dipanggil; dan lompang-lompang dalam mengendalikan ekshibit-ekshibit tanpa memanggil penjaga kedai.

Diputuskan, membenarkan rayuan; mengetepikan sabitan dan hukuman Mahkamah Tinggi:

(1) Hakim Mahkamah Tinggi tidak mengambil kira pembelaan yang ditimulkan oleh perayu dalam kenyataan beramarannya. Yang Arif tidak secara kehakiman mempertimbang pembelaan perayu sebagaimana dinyatakan dalam kenyataan beramarannya. Ia adalah tanggungjawab hakim bicara untuk mempertimbangkan pembelaan tersebut. Pembelaan yang lemah atau tidak munasabah perlu dipertimbangkan dan dinilai secara kehakiman. Ia tidak patut diketepikan tanpa diberikan pertimbangan sewajarnya. Kegagalan sebegini merupakan suatu tanpa arah oleh Yang Arif dan tanpa arah tersebut menjadi suatu salah arah (lihat perenggan 27–28).

(2) Yana sememangnya saksi utama. Dia telah melihat keseluruhan episod semasa duduk sebagai penumpang di bahagian depan kereta tersebut. Dia tidak dipanggil sebagai saksi oleh pendakwaan dan kenyataannya tidak diserahkan dan ditanda sebagai ekshibit oleh pendakwaan. Pendakwaan sepatutnya menyerahkan kenyataan Yana untuk menyangkal semua inferens negatif yang timbul. Tiada langsung cubaan untuk mencari Yana. Pendakwaan telah gagal untuk menjamin kehadiran Yana di mahkamah dan kegagalan untuk menyerahkan kenyataan Yana yang direkodkan di bawah s 112 Kanun Tatacara Jenayah menggagalkan kes pendakwaan. Yana tidak ditawarkan kepada pembelaan di penutup kes pendakwaan. Dia merupakan saksi pendakwaan yang penting yang boleh menjelaskan keadaan dan mengukuhkan pertuduhan terhadap perayu melampaui keraguan munsabah. Tanpa Yana, andaian di bawah s 114(g) Akta Keterangan 1950 hendaklah terpakai terhadap pendakwaan (lihat perenggan 36, 42–43 & 48).

(3) Tiada kewajipan pada pihak perayu untuk memanggil Yana sebagai saksi. Bahkan, tiada kewajipan ke atas perayu untuk memanggil apa-apa keterangan langsung. Perayu bebas menggunakan suatu cara tindakan dan bukan sebaliknya. Sememangnya ia adalah pilihan perayu dan apapun pilihan yang dibuat, tiada inferens yang tidak menyebelahinya patut dibuat terhadapnya (lihat perenggan 45).

(4) Ekshibit-ekshibit yang dirampas dari tempat kejadian jenayah itu adalah ekshibit-ekshibit sama yang dianalisis dan dibawa ke Mahkamah Tinggi dan jika begitu, tidak ada keperluan untuk memanggil penjaga kedai. Berikutan itu, tiada merit dalam perhujahan jurang apabila mengendalikan ekshibit-ekshibit dengan tidak memanggil penjaga kedai (lihat perenggan 38).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

For cases on failure of prosecution to call the witness, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3243–3255.

Cases referred to

Abu Bakar v Regina [1963] 1 MLJ 288 (refd)

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)

Ang Kian Chai v PP & Another Appeal [2012] 4 MLRA 456, CA (refd)

Chan Chor Shuh v PP [2003] 2 MLJ 26, CA (refd)

Er Ah Kiat v PP [1965] 2 MLJ 238, FC (refd)

Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577, FC (refd)

Goh Ah Yew v PP [1949] 1 MLJ 150 (refd)

Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (folld)
Liza bte Ismail v PP [1997] 2 SLR 454, HC (refd)
Mohan Singh a/l Lachman Singh v PP [2002] 3 MLJ 291, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Pendakwa Raya lwn Mohd Zulkifli bin Abdul Ghani dan satu lagi [2003] 5 MLJ 337, HC (refd)
PP v Mohd Fahmi bin Hamzah [2002] 6 MLJ 340, HC (refd)
PP v Nordin Awang [2000] MLJU 631; [2001] 1 AMR 855, HC (refd)
R v Bundy (1910) 5 Cr App Rep 270, CA (refd)
R v Emmanuel [1998] Crim LR 347, CA (refd)
Seneviratne v R [1936] 3 All ER 36, PC (refd)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)
Teoh Hoe Chye v PP; Yeap Teong Tean v PP [1987] 1 MLJ 220; [1987] CLJ (Rep) 386, SC (folld)
Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (refd)

Legislation referred to

Criminal Procedure Code s 112
Dangerous Drugs Act 1952 ss 2, 39B, 39B(1)(a), (2)
Evidence Act 1950 s 114(g)
Immigration Act 1959 s 6(1)(c)

Appeal from: Criminal Trial No 45–26 of 2003 (High Court, Shah Alam)

J Kuldeep Kumar (J Kuldeep Kumar & Co) for the appellant.
Farah Ezlin Yusop Khan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] Before the High Court at Shah Alam, the appellant was convicted and sentenced to death for trafficking in 2,884g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA. Aggrieved, the appellant now appeals to this court.

[2] The charge against the appellant was worded in this way:

> Bahawa kamu pada 11 September 2002 jam lebih kurang 5.30 petang di Jalan Teluk, Batu 1, Off Batu 41/2 Jalan Kampung Jawa, dalam daerah Klang dalam Negeri Selangor Darul Ehsan, didapati telah memperedar dadah berbahaya iaitu

2,884 gram cannabis dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE CASE FOR THE PROSECUTION

[3] On 11 September 2002 at 5.30pm, acting on information received, Chief Insp Chia Aik Chin ('SP2') accompanied by Detective Corporal Govindasamy a/l Raju (SP4) and other police personnel from the narcotics division of 'Ibu Pejabat Kontinjen' ('IPK') Selangor proceeded to the place mentioned in the charge and there, they kept vigil. Both SP2 and SP4 located themselves nearer to shop No 7877 at Jalan Teluk. All the police personnel were in civilian clothes.

[4] At about 6pm, both SP2 and SP4 saw a Proton Wira motorcar bearing registration No WJY 4762 stop in front of shop No 7877. That motorcar was driven by the appellant with a woman passenger who sat next to him. The appellant was seen by both SP2 and SP4 alighting from the said motorcar, carrying in his right hand a plastic bag, and walking towards the row of shophouses. SP2 observed the appellant for about a minute and noticed that the appellant was waiting for someone.

[5] Without furtherado, SP2 approached the appellant and SP2 introduced himself as a police officer. Upon hearing this, the appellant tried to escape. SP2 quickly wrapped his arms across the body of the appellant from behind in an attempt to arrest the appellant. A scuffle ensued. In the course of the struggle, the appellant dropped the plastic bag, which he carried, to the ground. The appellant bit the left arm of SP2 but was eventually subdued and arrested with the help of SP4 and the other police personnel.

[6] The plastic bag, which was dropped to the ground by the appellant during the struggle, was retrieved. In the presence of the appellant, SP2 examined the plastic bag with a brand name Rags Solid Station (exh 'P10') and found that it contained a *Berita Harian* newspaper package dated 22 August 2002 (exh 'P11') and inside it, SP2 found three compressed dried vegetable matters suspected to be cannabis, which were wrapped in aluminium foils and clear plastics (exhs 'P12', 'P13' and 'P14'). The woman passenger identified as Yana who was said to be the appellant's wife was arrested and together with the appellant and the exhibits, were taken to the police station at IPK Selangor.

[7] Before proceeding to the police station at IPK Selangor, SP2 and the police party were taken, at about 7pm, by the appellant and Yana to their house at Taman Berjaya, Klang. There, SP2 seized 1kg of vegetable matter suspected

to be cannabis and arrested three male Indonesians with the assistance of the police party. However, SP4 testified that he did not accompany SP2 to the house at Taman Berjaya, Klang.

[8] At IPK Selangor, SP2 marked the exhibits and initialled them. And on 11 September 2002 at 11.50pm, SP2 brought the exhibits together with the appellant and Yana to the police station at Pandamaran, Klang and handed them to Chief Insp Che Samsuddin bin Che Yusoff ('SP7'), the investigating officer of the case.

[9] SP7 also marked the exhibits accordingly.

[10] The material particulars in the evidence of SP4 in relation to what had happened at the scene of the crime corroborated the evidence of SP2.

[11] On 13 September 2002, SP7 sent the exhibits to the police forensic department at Cheras for the purpose of lifting the finger prints on the exhibits. DSP Izanizam bin Salleh ('SP5') was unable to lift any fingerprints on the exhibits because the 'characteristics' were insufficient for purposes of comparison. In short, SP5 gave a negative report.

[12] Investigations by SP7 revealed that the appellant and Yana hailed from Acheh, Indonesia and that the appellant alleged that Yana was his wife. Both the appellant and Yana had no valid travel documents.

[13] Evidence was led to show that Yana was charged and convicted for an offence under s 6(1)(c) of the Immigration Act 1959 for not being in possession of a valid travel document. Evidence was also led to show that the Proton Wira motorcar was registered in the name of Nor Haidawati bt Abdul Malek and it was leased for RM1,100 per month to Ahmad Rizan bin Abdul Razak who was carrying out a car rental business. Evidence also showed that the said motorcar was rented by a male Malay who came together with the appellant on 5 July 2002. According to SP7, the said motorcar was returned to its registered owner on an unspecified date.

[14] In due course, the government chemist by the name of Halimah bt Abd Rahim ('SP3') analysed the exhibits and confirmed that they were cannabis weighing 2,884g, a dangerous drug within the meaning of s 2 of the DDA.

THE APPELLANT'S DEFENCE

[15] The appellant gave his evidence under oath and he also called Lahmat bin Mustafa ('SD2') as his witness.

[16] The appellant testified that on 11 September 2002 at about 5.15pm when he was in a house at Bukit Rimau, Taman Berjaya, Jalan Sungai Rasau, Klang, he was asked by a man named 'Agus' to fetch SD2 at Batu 41/4 Kampung Jawa. The appellant agreed and at 5.20pm of the same day, he proceeded there in Agus's Proton Wira motorcar bearing registration No WJY 4762 accompanied by his wife named Yana. The appellant drove the said motorcar with Yana as a passenger in the front left seat.

[17] Half an hour later, the appellant arrived at his destination. He parked the said motorcar in front of a furniture shop and he alighted leaving Yana still seated in the front left seat. He walked towards SD2 who was, at that time, waiting in front of the hardware shop. According to the appellant, he did not carry anything in his hands when he alighted from the said motorcar. All of a sudden, three male individuals, who later turned out to be policemen, arrested him. He testifed to the following facts:

(a) that he did not attempt to run away when he was arrested because he had no opportunity to escape;

(b) that he did not struggle with the three policemen in an attempt to run away;

(c) that he did not bite the left arm of SP2 because after he was arrested, both his hands were handcuffed to the rear;

(d) that when he was arrested, he saw Yana still seated in the front left seat of the said motorcar; and

(e) that Yana was arrested when she was still in the said motorcar.

[18] He further testifed that after he and Yana were arrested, the police examined the said motorcar and found a plastic bag ('exh P10') located at the rear seat of the said motorcar. He said that prior to his arrest, he had never seen the plastic bag ('exh P10') before. While Yana was put in the said motorcar and driven away by a policeman, the appellant was placed in a police car and taken to his house at Bukit Rimau. He did not observe who carried the plastic bag ('exh P10') that the police found in the said motorcar. In his house, the police arrested three of his friends, namely Nordin, Zulfikar and Hafizal. He said that the police searched his house and he was unsure whether the police found any incriminating articles therein. He did not know whether Nordin, Zulfikar and Hafizal were charged in court or not.

[19] He testified that after his arrest, he gave a cautioned statement to the police. In his cautioned statement, he said that 'Agus' stayed with him. When asked, he also said in his cautioned statement that the *ganja* in the plastic bag ('exh P10') was found inside the said motorcar.

[20] Under cross-examination, the appellant denied that he carried the plastic bag ('exh P10') containing three compressed dried vegetable matters suspected to be cannabis. He also denied that before the police arrested him, the police had introduced themselves. He also denied that he tried to run away after the police had introduced themselves. He denied that one of the policemen had wrapped his arms across his body and a scruffle ensued. He denied that in the course of the struggle, he had bitten the left arm of one of the policemen. He denied that the police retrieved the plastic bag ('exh P10') that fell to the ground during the struggle with him. He denied that the police showed him the contents of the plastic bag ('exh P10') after his arrest. He also denied that Yana got out of the said motorcar and there, she was arrested.

[21] However, he agreed under cross-examination that he did not tell the police about SD2. In re-examination, he advanced a reason for not telling the police about SD2 and that was because the latter was not connected to the case. He reiterated that he told the police that the said motorcar belonged to Agus and that SD2 had no connection with the said motorcar at all. He emphasised that SD2 existed but he did not know where SD2 stayed in Malaysia because SD2 had just arrived in Malaysia from Acheh. He too said that he was not certain where SD2 was working.

[22] The testimony of SD2 corroborated the evidence of the appellant to the following effects:

(a) that the appellant did not hold anything in his hand ('tidak memegang apa-apa di dalam tangannya') (p 135 of the appeal record at *Jilid 2*) when he was arrested; and

(b) that SD2 saw the police recovered a plastic bag ('exh P10') from the backseat of the said motorcar.

ANALYSIS

[23] Before us, only two issues were advanced. The first issue concerned the non-calling of Yana, while the second issue pertained to the gaps in the handling of the exhibits by the non-calling of the store keeper. We will now consider these two issues seriatim.

THE FIRST ISSUE

[24] There were two conflicting versions of what actually transpired on the date of the offence as set out in the charge. The prosecution has one version while the defence has another version. Both SP2 and SP4 testified that they saw the appellant carried the plastic bag ('exh P10') containing the drugs in the

right hand when the appellant alighted from the said motorcar and walked towards the row of shop houses particularly in the direction of the hardware shop. The appellant denied in his defence that he held the plastic bag ('exh P10') containing the drugs in his right hand as he alighted from the said motorcar.

[25] The appellant raised his defence at the first available opportunity when he mentioned in his cautioned statement that the plastic bag ('exh P10') was recovered from the backseat of the said motorcar. It is germane to mention that the appellant's defence as enumerated in the cautioned statement was affirmed by SP7 — the investigating officer, during the cross-examination of SP7. In his cross-examination, SP7 was asked the following pertinent questions and the answers elicited from him can be seen at p 108 of the appeal record at *Jilid 1*:

S: Setuju kamu ada aturkan percakapan daripada tertuduh di bawah s 37A Akta Dadah Berbahaya pada 19 September 2002.

J : Ya, setuju.

S : Selaku IO, kamu ada baca percakapan tertuduh tersebut

J : Ya, ada.

S : Setuju di dalam percakapan beliau, tertuduh ada kata yang ganja dijumpai dari dalam kereta.

J : Saya tak ingat.

S : Boleh kamu rujuk percakapan tertuduh tersebut

J : Ya, setelah membacanya sekarang saya sahkan tertuduh ada mengatakan sedemikian di dalam percakapannya.

[26] We must highlight that although the cautioned statement was not marked as an exhibit by either the prosecution or the defence, yet it was alluded to by SP7 in cross-examination.

[27] We have perused through the written grounds of judgment of the learned High Court judge and we detected that His Lordship did not consider the defence raised by the appellant in his cautioned statement as alluded to by SP7 in his cross-examination. Such failure constituted an appealable error. A classic example would be the case of *Er Ah Kiat v Public Prosecutor* [1965] 2 MLJ 238 where the trial judge did not consider the defence and the Federal Court allowed the appeal and set aside the conviction and sentence.

[28] Here, the learned High Court judge did not judicially appreciate the defence of the appellant as stated in his cautioned statement. In our judgment, it was the bounden duty of the learned High Court judge to consider that defence. Such failure amounted to a non-direction by His Lordship. And that

non-direction amounts to a misdirection. In *R v Bundy* (1910) 5 Cr App Rep 270 Pickford J held that a misdirection as to the evidence of identification of the defendant may be a ground for quashing a conviction.

[29] A weak or an unreasonable defence must be considered and appreciated judicially. It should not be brushed aside without giving it due consideration. This is the law and it is entrenched in the following authorities:

(a) *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577;

(b) *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 (FC);

(c) *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26 (CA); and

(d) *Pendakwa Raya lwn Mohd Zulkifli bin Abdul Ghani dan satu lagi* [2003] 5 MLJ 337.

[30] The trial judge in *R v Emmanuel* [1998] Crim LR 347 refused to put to the jury the weak defence advanced by the appellant. The appellate court allowed the appeal and Their Lordships held that no matter how weak the defence was, it must be left to the jury to consider and decide. In all the circumstances, the conviction was held to be unsafe and it was quashed.

[31] SD2 corroborated the appellant's testimony in court when he gave evidence to the effect that the appellant was not holding anything when he got out of the said motorcar. The version advanced by SD2 was contrary to and in sharp contrast to the testimonies of SP2 and SP4. The learned High Court judge disbelieved the evidence of SD2 and His Lordship had this to say about this witness at p 213 of the appeal record at *Jilid 2*:

> SD2 (Lahmat bin Mustaffa) yang dipanggil untuk tertuduh mengesahkan keterangannya adalah didapati seorang saksi yang tiba-tiba muncul atau disebut pertama kalinya di dalam pembelaan. Nama ini tidak pernah disebut atau dicadangkan kepada Pegawai Penyiasat semasa beliau memberi keterangan. Kredibiliti SD2 ini juga adalah didapati agak meragukan apabila beliau mula masuk ke Malaysia secara haram pada 3 September 2002 sedangkan pasport beliau menunjukkan satu-satunya cop masuk beliau ke Malaysia adalah 9 October 2009 iaitu selepas tarikh kejadian. Walaupun begitu keterangan SD2 ini jelas tidak membantu tertuduh apabila beliau mengesahkan keterangan Chief Insp Chia Aik Chin (SP2) bahawa tertuduh sememangnya bergelut dengan Chief Insp Chia sebelum ditangkap bercanggah dengan keterangan tertuduh yang menafikan pergelutan tersebut.

[32] It is apparent that the learned High Court judge disbelieved the evidence of SD2 because the latter's evidence was not put to the prosecution's witnesses — be it SP2, SP4 or SP7. However, His Lordship chose only to

believe SD2's evidence when it confirmed the version of SP2 that the appellant struggled with SP2 before the appellant was arrested. To be fair to the learned High Court judge, the appellant agreed under cross-examination that he did not tell the police about SD2 at all. At this juncture, we recalled to mind the case of *Mohan Singh a/l Lachman Singh v Public Prosecutor* [2002] 3 MLJ 291, where Gopal Sri Ram JCA (as he then was) aptly said at p 297 of the report:

> The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific questions relevant to its case. Such gaps must be filled by the prosecution itself: *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16. That has always been the law. It is still the law.

[33] There is a short passage appearing in the judgment of Edgar Joseph Jr FCJ in *Alcontara a/l Ambross Anthony v Public Prosecutor* at p 218, that merits reproduction. It is this:

> However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

[34] Yong Pung How CJ (Singapore) in *Liza bte Ismail v Public Prosecutor* [1997] 2 SLR 454 held that notwithstanding the non cross-examination, it was still incumbent on the trial judge to determine the cogency and weight of the unchallenged testimony.

[35] Be that as it may, based on the testimonies of SP2 and SP4 with that of the appellant and SD2, we have the nagging doubts as to the location of the drugs. Were the drugs in the plastic bag ('exh P10') carried by the appellant in his right hand or were the drugs in the plastic bag ('exh P10') recovered by the police from the backseat of the said motorcar. This is where the role of Yana plays a prominent part. Yana was a passenger of the said motorcar. She sat in the front passenger seat and she remained seated there and witnessed what went on. Under cross-examination, SP7 confirmed that Yana was arrested whilst she was still inside the said motorcar. In this context, the cross-examination of SP7 at p 108 of the appeal record at *Jilid 1* should be reproduced:

> S: Benarkah Yana juga ditangkap di dalam kereta tersebut.
>
> J : Saya tak ingat.
>
> S : (Setelah melihat kertas siasatan). Mengikut laporan polis yang dibuat, Yana ditangkap di dalam kereta.
>
> J : Ya.

[36] Yana was certainly a key witness. She saw the whole episode while seated as a front passenger in the said motorcar. She was not called as a witness by the prosecution and her statement was not tendered and marked as an exhibit by the prosecution. In our judgment, the prosecution should have tendered the statement of Yana to negate all the negative inferences that arose as a result of the cross-examination of the prosecution's witnesses.

[37] It was SP7 who testified that Yana was charged for an offence under s 6(1)(c) of the Immigration Act 1959 for not being in possession of a valid travel document. But SP7 did not know the outcome of the court case. However, SP7 confirmed that Yana was not charged for trafficking under s 39B of the DDA.

[38] SP7 was not particularly concerned about the whereabouts of Yana after she was sentenced for an immigration offence by the court. In fact, SP7 did not make any attempt to trace Yana at all. In his examination-in-chief, SP7 had this to say about Yana at p 106 of the appeal record at *Jilid 1*:

> Seorang lagi tangkapan bernama Yana binti Abdullah. Selepas beliau dituduh dan dijatuhkan hukuman di bawah seksyen 6(1)(c) Akta Imigresen, saya tidak lagi tahu apa yang terjadi kepada beliau. Saya tidak ada cuba mengesan beliau.

[39] SP7 adopted a non-chalant attitude towards Yana. He neither seized Yana's passport nor secured the marriage certificate of Yana or any other document to show that Yana was married to the appellant. He did not record in his investigation diary ('ID'), the number of days that Yana was detained. However, he recorded in the remand ID that was enclosed in the investigation paper that Yana was remanded for 13 days from 12 September 2002 to 25 September 2002. All these facts can be seen in the cross-examination of SP7 at p 107 of the appeal record at *Jilid 1*.

[40] Of crucial importance, SP7 agreed that he recorded the statement of Yana under s 112 of the Criminal Procedure Code ('CPC'). At p 108 of the appeal record at *Jilid 1*, this was what SP7 said in cross-examination:

> S: Adakah kamu mengambil percakapan daripada Yana ini.
>
> J : Ya, ada di bawah seksyen 112 CPC.

[41] Under cross-examination, SP7 admitted that he did not take any action to ensure Yana's attendance as a witness in this case. Although SP7 investigated as to how Yana entered Malaysia, he admitted that he had forgotten as to how Yana had entered Malaysia. However, SP7 agreed that if Yana had no valid

travel document, she could not leave the country through the designated exit point. All these facts are taken from the cross-examination of SP7 at p 109 of the appeal record at *Jilid 1*.

[42] It is apparent that the prosecution failed to secure the attendance of Yana in court. And the failure on the part of the prosecution to tender Yana's statement recorded under s 112 of the CPC crippled the prosecution's case. Yana was not even offered to the defence at the close of the prosecution's case.

[43] It is purely a question of fact whether a particular witness is material or otherwise. What is of importance is to consider whether the material witness is 'essential to the unfolding of the narratives on which the prosecution case is based' (to borrow the words of Lord Roche in *Seneviratne v R* [1936] 3 All ER 36 (PC), at p 49) or to borrow the words of Mohamed Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC), at p 494, that witness must be 'an important and material witness to the case'. And if the answer is in the affirmative, then the witness is said to be material. In the context of the present appeal, 'Yana' was an indispensable prosecution witness that would tie up the loose ends, so to speak, and drive home the charge against the appellant beyond reasonable doubt.

[44] *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433, is a Federal Court case. It concerned an informer who was found by the Federal Court to have somehow assumed the role of an agent provocateur but was neither called by the prosecution nor offered to the defence at the close of the prosecution's case. That was considered fatal by the Federal Court and in setting aside the conviction, Edgar Joseph Jr FCJ writing for the Federal Court laid down the law at p 440 in these lucid terms:

> Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see, eg *Adel Muhammed el Dabbah v A-G of Palestine* [1944] AC 156 at pp 167–169; [1944] 2 All ER 139 at pp 143–144), the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation — which is nothing less than a statutory duty — the accused must be acquitted.

[45] There is no duty on the part of the appellant to call Yana as his witness. In fact, there is no duty on the appellant to call any evidence at all. The appellant is at liberty to adopt one course of action and not the other. Indeed it is the appellant's choice and whatever choice he makes, no unfavourable inference should be drawn against him (*Goh Ah Yew v Public Prosecutor* [1949] 1 MLJ 150; *Abu Bakar v Regina* [1963] 1 MLJ 288; and *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19). Yana as a material witness to the unfolding of the

factual matrix of the case can never be doubted. She held the trump card, so to speak, to determine as to the location of the plastic bag ('exh P10') containing the drugs at the material time when SP2 confronted the appellant. That doubt could have been resolved if the prosecution had called Yana as a witness or alternatively, if the statement of Yana recorded under s 112 of the CPC was tendered.

[46] In *Ang Kian Chai v Public Prosecutor & Another Appeal* [2012] 4 MLRA 456(CA), the prosecution did not call Chen Jing as a witness and her s 112 statement was also not tendered. And Abdul Malik bin Ishak JCA writing the judgment of the Court of Appeal had this to say at p 463 of the report:

> (27) Learned counsel for the appellant implored this Court to invoke s 114(g) of the Evidence Act 1950 not because of the failure of the prosecution to produce Chen Jing in person but rather because of the failure of the prosecution to tender the section 112 statement of Chen Jing bearing in mind that the prosecution had in its possession the section 112 statement of Chen Jing. We agree with the submission of learned counsel and towards this end it is opportune to refer to the case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, SC. There the court said that the withholding of a material document and its non production would be fatal. Likewise here, the withholding of section 112 statement of Chen Jing must be held to be detrimental to the case for the prosecution because that statement was a material document that would assist the court to arrive at a just decision.

[47] Just like Chen Jing in A*ng Kian Chai v Public Prosecutor & Another Appeal*, Yana was also a material witness and her s 112 statement was a material document that would shed light as to the location of the plastic bag ('exh P10') containing the drugs at the material time. To compound the matter further, the non-production of Yana, an important and material witness to the case, gave rise to the adverse inference that if she had been called, her evidence would be unfavourable to the prosecution and that being the case, the presumption in s 114(g) of the Evidence Act 1950 must be invoked against the prosecution (*Public Prosecutor v Mohd Fahmi bin Hamzah* [2002] 6 MLJ 340; and *Public Prosecutor v Nordin Awang* [2000] MLJU 631; [2001] 1 AMR 855).

[48] For these varied reasons, we decided the first issue in favour of the appellant. Without Yana, the presumption under s 114(g) of the Evidence Act 1950 must be vigorously applied against the prosecution.

THE SECOND ISSUE

[49] We must now direct our attention to the second issue. It concerned the gaps in the handling of the exhibits by the failure on the part of the prosecution to call the store keeper.

[50] It was argued that there were doubts as to the identity of the exhibits. SP2 testified that he brought back the cannabis seized in this case — referring to Kampung Jawa, and the cannabis seized from the Taman Berjaya in his personal car. The exhibits were unmarked throughout the journey from Kampung Jawa (the place where the appellant and Yana were arrested) to Taman Berjaya (the subsequent arrest of three male Indonesians) and then to IPK Selangor. The markings and labellings of the exhibits pertaining to the Kampung Jawa were done in the presence of the appellant and Yana when they reached IPK Selangor. Hence, it was submitted that there is a possibility of a mix up between both the exhibits from Kampung Jawa and Taman Berjaya.

[51] Our attention was drawn to the evidence of SP2 at the cross-examination stage as seen at p 56 of the appeal record at *Jilid 1* and the exchange went like this:

> S: Kamu kata untuk kes Tertuduh hari ini, kamu bawa balik barang kes yang dirampas dalam kereta kamu sendiri.
>
> J : Ya.
>
> S : Oleh itu setuju bahawa barang kes rampasan dari Taman Berjaya Klang dibawa balik ke IPK bersama barang kes untuk kes Tertuduh hari ini dalam satu kereta yang sama iaitu kereta kamu sendiri.
>
> J : Ya.

[52] In this context, it is germane to refer to the speech of Abdul Hamid Omar CJ (Malaya) (later the Lord President of the Supreme Court) in *Teoh Hoe Chye v Public Prosecutor; Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220; [1987] CLJ (Rep) 386. There, His Lordship aptly said at p 230 (M LJ); p 389 (CLJ) of the report:

> We would observe at this point that the law is clear in that 'it is unnecessary to call evidence to ensure there is no break in the chain of evidence' (*Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75). But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution's case. In the instant case there was such a failure.

[53] And because of these doubts as to the identity of the exhibits and relying on *Teoh Hoe Chye*'s case, it was submitted that the prosecution should have called the storekeeper. It was further submitted that no evidence as to what the storekeeper did with the exhibits was led and how long he kept the exhibits was not made known at all. According to the defence, the store register book was not even tendered. Finally, it was submitted that there was a possibility that the exhibits brought to the High Court during the trial may have been those cannabis seized from the Taman Berjaya house.

[54] By way of a response, learned deputy public prosecutor pointed out that the issue of mixed drugs was neither raised nor put to the prosecution's witnesses. And that throughout the trial, SP2 made it clear that the cannabis found in Taman Berjaya was in relation to a different case not related to the Kampung Jawa episode.

[55] In his examination-in-chief, SP2 testified that the plastic bag ('exh P10') containing the three compressed dried vegetable matters suspected to be cannabis was under his control throughout until it was handed over to SP7 — the investigating officer. SP2 also testified that he held and carried the exhibits and did not pass them to anyone to hold until he handed them to SP7 himself. In its original text, this was what SP2 said in his examination-in-chief as seen at pp 14–15 of the appeal record at *Jilid 1*:

> Sepanjang masa barang kes itu iaitu beg plastik yang mengandungi 3 ketulan mampat (disyaki ganja) di bawah kawalan saya sehingga barang itu diserahkan kepada IO Sepanjang masa barang kes saya yang membawanya dan tidak menyerahkan kepada orang lain untuk memegang selain IO.

[56] SP2 also testified in his examination-in-chief that he recognised the exhibits that he seized by looking at the markings 'A', 'B', and 'B1–B3', dated 11 September 2002 and his signatures on the exhibits thereto. SP2 also testified that the markings were made by him in the presence of the appellant and Yana. In its original text, this was what SP2 said at p 37 of the appeal record at *Jilid 1*:

> Saya masih ingat tandaan-tandaan yang saya buat ke atas barang kes tersebut iaitu saya menandakan 'A' pada satu beg plastik jenama 'Rags Solid Station' dan 'B' pada bungkusan surat khabar Berita Harian bertarikh 20 Ogos 2002 dan saya tandakan 'B1' hingga 'B3' pada masing-masing tiga ketulan mampat yang disyaki ganja yang dibaluti kertas timah dan plastik lutsinar. Saya tandakan 'C' kepada dua anak kunci bersama satu penggera untuk kereta Wira tersebut. Di atas kesemua barang-barang kes ini saya juga turunkan tandatangan saya dan tuliskan tarikh 11 September 2002. Semasa saya membuat penandaan-penandaan ini, kedua-dua orang yang ditangkap iaitu OKT dan perempuan bernama Yana tersebut berada di hadapan saya.

[57] The markings of the exhibits by SP2 as identified by him and the signatures of SP2 on the exhibits together with the dates written thereto on the exhibits showed that those were the exhibits in relation to the charge before the learned High Court judge and before us on appeal. All these markings showed that the exhibits were the same exhibits seized from the scene of the crime at Kampung Jawa on 11 September 2002 and analysed by SP3 and brought to the High Court before the learned judge for trial. At this juncture, we refer to the case of *Gunalan Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489;

A [2004] 4 CLJ 551 (CA), at pp 509–510 (MLJ); 568–569 (CLJ), and we gratefully adopt what Abdul Hamid bin Mohamed JCA (later Chief Justice) said in that case:

> First, by way of a general observation, I am of the view that, in a drug trafficking case
B what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc. and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even
C then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was
D analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with.
>
> The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap', does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of
E evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.

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[58] In our judgment, the exhibits seized from the scene of the crime at Kampung Jawa on 11 September 2002 were the same exhibits that were analysed by SP3 and brought to the High Court and that being the case, there
G was no necessity to call the storekeeper. Consequently, we agreed with learned deputy public prosecutor that there was no merit in regard to the second issue. We decided the second issue in favour of the prosecution.

CONCLUSION

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[59] Since we agreed that the first issue favoured the appellant, we allowed the appeal. The conviction and the sentence of death imposed by the High

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Court at Shah Alam were set aside. The appellant was acquitted and discharged forthwith. We restored freedom to the appellant.

Appeal allowed, conviction and sentence of High Court set aside.

Reported by Afiq Mohamad Noor